

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

HOOD CANAL SAND & GRAVEL LLC DBA
THORNDYKE RESOURCE, OLYMPIC
STEWARDSHIP FOUNDATION, J. EUGENE
FARR, WAYNE AND PEGGY KING, ANNE
BARTOW, BILL ELDRIDGE, BUD AND VAL
SCHINDLER, RONALD HOLSMAN,
CITIZENS' ALLIANCE FOR PROPERTY
RIGHTS JEFFERSON COUNTY, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS LEGAL
FUND, MATS MATS BAY TRUST, JESSE A.
STEWART REVOCABLE TRUST, AND
CRAIG DURGAN,

Petitioners,

v.

JEFFERSON COUNTY AND WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents,

and

HOOD CANAL COALITION,

Intervenor.

Case No. 14-2-0008c

**SECOND AMENDED PREHEARING
ORDER, ORDER GRANTING SECOND
SETTLEMENT EXTENSION, AND
ORDER ON DISPOSITIVE MOTION**

This matter came before the Board in a Prehearing Conference held telephonically on May 14, 2014. The matters discussed at that conference were summarized in the Board's May 23, 2014, Prehearing Order and Order Granting Settlement Extension. That order also set forth the parties' revised and corrected issue statements, and stated that the

1 issue statements may be further refined and some eliminated. Additionally, the parties' May
2 19, 2014, joint Request for Settlement Extension was granted by that order.

3 On June 4, 2014, the Board issued its Amended Prehearing Order, Order Granting
4 Settlement Extension, and Order Amending Dispositive Motion Deadlines, which amended
5 the deadlines for dispositive motions.

6 On August 15, 2014, Respondent Ecology filed a Motion for Partial Summary
7 Judgment requesting the Board enter an order dismissing all of the Petitioners'
8 constitutional issues.

9
10 The Board and parties to this case met on August 19, 2014, to review the many
11 issues posed in the Petitions for Review. Representatives from Petitioner Hood Canal Sand
12 & Gravel LLC, dba Thorndyke Resource (Hood Canal Sand) appeared through its attorney
13 James Tracy. Petitioners Olympic Stewardship Foundation, J. Eugene Farr, Wayne and
14 Peggy King, Anne Bartow, Bill Eldridge, Bud and Val Schindler, and Ronald Holsman (OSF)
15 appeared through their attorney Dennis Reynolds. Petitioners Citizens' Alliance for Property
16 Rights, Jefferson County chapter, Citizens' Alliance for Property Rights Legal Fund, Mats
17 Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (Citizens) appeared
18 through their attorney Paul Hirsch. Mark Johnsen appeared on behalf of Respondent
19 Jefferson County and Sonia Wolfman appeared for Respondent Washington State
20 Department of Ecology. Board members William Roehl and Cheryl Pflug were in
21 attendance with Board Member Nina Carter convening the meeting as the Presiding Officer.

22 The following matters were discussed at the meeting:

- 23
- 24 • The Board presented consolidated issues from the Petitions for Review to which
 - 25 the parties agreed for the most part. Petitioners offered a few suggested edits
 - 26 with the Respondents' concurrence.
 - 27
 - 28 • The Parties discussed a revised schedule to allow more time and they agreed to
 - 29 file a joint request for settlement extension.
 - 30
 - 31 • In response to Respondent Ecology's Motion for Partial Summary Judgment,
 - 32 Petitioners asked for more time to file their reply, until August 29, 2014. The

1 Board ruled orally to grant this extension. On August 29, 2014, the Board
2 received OSF Petitioners' Response to the Motion for Partial Summary Judgment.
3 On August 25, 2014, the parties filed a joint Second Request for Settlement
4 Extension requesting that the Board grant a 60-day extension of the case schedule for the
5 purpose of exploring settlement.
6

7 I. REVISION OF ISSUES

8 Petitions for Review were filed by Hood Canal Sand on April 14, 2014, OSF on April
9 15, and Citizens on April 18. Following the August 19, 2014, meeting of the Board and
10 parties, the OSF Petitioners filed their additional issues for inclusion in this Prehearing
11 Order. No objection to the issues as discussed and proposed by the OSF Petitioners was
12 received. **The Issue Statements as revised are attached to this Order.**
13

14 *The Petitioners have the obligation to review these issue statements to ensure they*
15 *properly set forth the issues each has raised. If a Petitioner objects to the completeness or*
16 *accuracy of its issue statements, they must file a written motion for change together with the*
17 *proposed changed issue or issues in their entirety no later than seven (7) days from the*
18 *date of this order.*
19

20 II. DISPOSITIVE MOTION

21 Petitioners have raised numerous issues asserting constitutional claims. (See Issues
22 8.26 – 8.34 and 8.36 – 8.37 attached in Appendix A.) Respondent Ecology's August 15,
23 2014, Motion argued the Board does not have jurisdiction to consider constitutional claims.¹
24 OSF Petitioners wish to preserve their constitutional claims for further appeal and have thus
25 brought these issues to the Board in order to exhaust their administrative remedies.² The
26 Board is created by statute as a quasi-judicial body of limited jurisdiction with no inherent or
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32 ¹ Ecology's Motion for Partial Summary Judgment (August 15, 2014) at 4-6.

² Petitioners' Response to Motion for Partial Summary Judgment (August 29, 2014) at 4-6.

1 common law powers.³ As discussed at the August 19, 2014, meeting with all the parties,
2 the Board lacks jurisdiction to address constitutional claims. RCW 36.70A.280; RCW
3 36.70A.300(1).

4 **The Board finds** that it lacks jurisdiction to hear Issues 8.26 – 8.34 and 8.36 – 8.37
5 and dismisses those issues.

6 Accordingly, Issues 8.26 – 8.34 and 8.36 – 8.37 **are dismissed**.

7 Issue 8.35, although not raising a constitutional claim, asserts the violation of RCW
8 43.21H, a statute not within the Board's jurisdiction. (See Issue 8.35 in Appendix A.)
9

10 **The Board finds** Issue 8.35 is not within the Board's statutory authority.

11 Issue 8.35 **is dismissed**.

12 **III. BURDEN OF PROOF**

13
14 In its dispositive motion, Ecology also seeks Board clarification that facial challenges
15 to an SMP that includes Shorelines of Statewide Significance (SSWS) require petitioners to
16 establish a violation by clear and convincing evidence.⁴
17

18 *Applicable Law*

19 RCW 90.58.190(2) governs the Board's review and provides, in relevant part:

20 (b) If the appeal to the growth management hearings board concerns
21 **shorelines**, the growth management hearings board shall **review the**
22 **proposed master program or amendment solely for compliance with**
23 **the requirements of this chapter, the policy of RCW 90.58.020 and the**
24 **applicable guidelines**, the internal consistency provisions of RCW
25 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105, and chapter
26 43.21C RCW as it relates to the adoption of master programs and
27 amendments under chapter 90.58 RCW.

28 (c) If the appeal to the growth management hearings board concerns a
29 **shoreline of state-wide significance**, the board shall uphold the decision
30 by the department unless the board, by **clear and convincing evidence**,

31 ³ *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998) (citing
32 RCW 36.70A.280(1) and .290).

⁴ Ecology's Motion for Partial Summary Judgment (August 15, 2014) at 10-11.

determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines. (**Emphasis added**).

OSF Petitioners respond that the County's SMP map does not distinguish between shorelines and SSWS,⁵ and that it omits reference to associated shorelands in its description of SSWS. Petitioners assert the Board lacks authority to "judicially amend" the SMP to differentiate between shorelines and shorelines of statewide significance" and thus reasons the Board may not apply the clear and convincing evidence standard.⁶ The Board will not judicially amend an SMP, but disagrees with OSF Petitioners' conclusion. Shorelines of statewide significance are expressly defined in the SMA. Thus, the status of a particular shoreline depends on where it fits under the criteria laid out in RCW 90.58.030 and does not change because it was or was not distinguished in a County's SMP.

The Board finds, to the extent that Petitioners challenge provisions relating to SSWS, they must meet the clear and convincing standard of proof.

IV. SETTLEMENT EXTENSION AND AMENDED SCHEDULE

Pursuant to WAC 242-03-575, the Presiding Officer may authorize one or more extensions of up to ninety days each if all parties named in the caption of the petition agree to and sign the request for extension. In accordance with the terms of RCW 36.70A.300(2)(b), the Board grants the parties' August 25, 2014, joint motion for a 60-day settlement extension. The following schedule shall remain in effect unless modified in writing by subsequent order:

April 14, 2014 April 15, 2014 April 18, 2014	Petitions for Review filed
April 28, 2014	Notice of Hearing and Preliminary Schedule
May 14, 2014	Prehearing Conference
May 30, 2014	Index Due (Respondents to file)

⁵ Petitioners' Response to Motion for Partial Summary Judgment (August 29, 2014) at 9.

⁶ Petitioners' Response to Motion for Partial Summary Judgment (August 29, 2014) at 10.

June 13, 2014	Additions to Index Due
June 27, 2014	Deadline for Motions to Supplement the Record (proposed supplements to be attached)
July 7, 2014	Deadline for Responses to Motions to Supplement the Record
July 17, 2014	Anticipated Date of Order on Motions to Supplement the Record
August 8, 2014	Joint Status Report due
August 15, 2014	Deadline for Dispositive Motions
August 19, 2014	Meeting of the Board and Parties
August 29, 2014	Deadline for Responses to Dispositive Motions
September 5, 2014	Order on Dispositive Motion
November 17, 2014	Deadline for Petitioners' Prehearing Brief (with exhibits)
December 31, 2014	Deadline for Respondents' Prehearing Brief (with exhibits)
January 14, 2015	Deadline for Petitioners' Reply Brief (optional)
January 21, 2015 10:00 a.m.	Hearing on Merits of Petition Location to be determined
March 16, 2015	Final Decision and Order Deadline

V. RECORD

Index - The Respondents filed their Indexes of all documents considered in taking the challenged action on May 30, 2014.

Additions to the record are items which were overlooked and the Respondent agrees should be added to the Index. Additions to the record should be submitted with proposed Index numbers. Additions disputed by the Respondent will not be allowed as additions to the record **provided** that the Respondent notifies the Petitioners of its objection within five days of receiving notice of the proposed additions.

Petitioners shall review the Index prepared by the Respondent promptly and add to the Index if omissions have occurred. Petitioners shall leave a space of 100 numbers between the last number in the Index prepared by the Respondent and any additions offered by the Petitioners. Additions shall be limited to documents or exhibits submitted to the Respondent in the action challenged. If the Respondent objects to the additions, the

1 Petitioners may seek to add the documents to the record of documents from which exhibits
2 may be drawn without objection through a motion to supplement the record.

3 The record may be supplemented with other evidence if the motion to supplement
4 demonstrates the evidence is necessary, or will be of substantial assistance to the Board in
5 reaching its decision. See RCW 36.70A.290(4). Motions to supplement should also include
6 proposed Index numbers for the evidence sought to be included in the Index. Supplements
7 to the record may come from outside the Respondent's record but must be shown to be
8 "necessary or of substantial assistance to the board in reaching its decision." Any
9 supplements to the record proposed must meet the standard set forth in RCW
10 36.70A.290(4).
11

12 VI. EVIDENCE

13 The Index to the Record lists the documents that may be introduced as exhibits but
14 those documents do not become evidence until they are referenced in a brief and submitted
15 to the Board as exhibits to that brief.
16

17 **Exhibits** – The evidence before the Board shall consist of the exhibits attached to
18 briefs and presented to the Board. The briefs must cite the exhibits and explain how the
19 exhibits support the arguments in the briefs. The exhibits should contain the Index
20 number(s) from which they are drawn.
21

22 **The parties shall tab each exhibit and submit a Table of Exhibits for briefs filed**
23 **with the Board and with other parties.** Exhibits shall be filed at the same time as hearing
24 briefs and served on all parties but may not be served electronically. If the brief is filed
25 and/or served electronically, the exhibits to that brief will be deemed timely filed if they are
26 placed in the U.S. mail postage paid on the same day. See WAC 242-03-240.
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28 VII. BRIEFS

29 Briefs shall be filed with the Board and served on the representatives of the other
30 parties on the dates and times specified in the schedule. If no time is specified, they must
31 be served by 5:00 p.m. **The original and three copies of briefs and exhibits are**
32

1 required by the Board. Please two-hole punch the original and three-hole punch the
2 left side of the three copies. WAC 242-03-240 requires each party to submit an electronic
3 version of each brief (without exhibits) to the Board, unless a party lacks technical capability.
4 Please also file each brief in Word format at western@elaho.wa.gov. All
5 documents/correspondence filed with the Board must be postmarked and mailed on the
6 same date as the electronic filing.
7

8 All exhibits shall be tabbed and include a Table of Exhibits. Documents other than
9 exhibits shall be typewritten or printed, properly captioned, signed by the appropriate person
10 submitting the same, shall include his/her address and telephone number, and shall be on
11 8-1/2 x 11 inch paper.

12 Length of Briefs – As discussed at the August 19, 2014 meeting, the
13 Petitioners' opening prehearing briefs for the hearing on the merits shall be limited to
14 30 pages each plus exhibits. The Petitioners are encouraged to coordinate their briefing
15 to avoid duplication of argument. Petitioners' reply briefs shall be limited to 10 pages.
16 Respondents have up to 35 pages each plus exhibits for their prehearing briefs for
17 the hearing on the merits. The Respondents are also encouraged to coordinate their
18 briefing to avoid duplication of argument. Intervenor is granted 20 pages plus exhibits
19 for its prehearing briefs for the hearing on the merits. In the event a party wishes to file
20 a longer brief, the party must provide the reasons for additional length and request
21 permission to file an over-length brief from the presiding officer. Pursuant to WAC 242-03-
22 590(1), failure of a party to brief an issue in the opening brief is deemed abandonment of
23 that issue. A party may adopt by reference the briefing of another party.
24

25 If a brief is 15 pages or longer, it shall have a table of authorities and a table of
26 contents. WAC 242-03-590(3) states: "Clarity and brevity are expected to assist the board
27 in meeting its statutorily imposed time limits. A presiding officer may limit the length of a
28 brief and impose format restrictions."
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30 Motion briefs and responses shall be limited to 15 pages. Reply briefs on
31 motions are not allowed and, if submitted, shall be disregarded.
32

1 **VIII. RULES OF PROCEDURE**

2 The Board's Rules of Practice and Procedure shall apply to the proceedings in this
3 case. The Board's Rules of Practice and Procedure may be found in the Washington
4 Administrative Code (WAC), at Chapter 242-03.
5

6 **IX. DISABILITY ACCOMMODATION**

7 Any person who requires an accommodation to participate in or attend hearings is
8 asked to contact the Board at least one week in advance of the scheduled hearing to
9 arrange an appropriate accommodation.
10

11 **X. FAILURE TO ATTEND OR PARTICIPATE**

12 A party who fails to attend or participate in any hearing or other stage of the
13 adjudicative proceedings before the Board may be held in default and an order of default or
14 dismissal may be entered pursuant to WAC 242-03-710.
15

16 **XI. COMMUNICATION WITH THE BOARD**

17 Pursuant to RCW 34.05.455, the parties may not communicate *ex parte* with the
18 Presiding Officer or other Board members. The parties are directed to Vanessa Smith,
19 Administrative Assistant to the Board, at (360) 664-9170 or western@eluhio.wa.gov, who will
20 act as Board liaison.
21

22 DATED this 5th day of September, 2014.
23
24

25 _____
26 Nina Carter, Board Member
27

28 _____
29 William Roehl, Board Member
30

31 _____
32 Cheryl Pflug, Board Member

APPENDIX A

Issues of Petitioner Hood Canal Sand & Gravel, LLC⁷

1. Petitioners challenge to the SMP includes contentions that the County's SMP, adopted and approved by Ecology, is unconstitutional in whole or part. These issues are raised based on violation of/inconsistency with WAC 173-26-186(5) and WAC 173-26-211. They are also raised so that they are preserved for appeal to the courts after exhaustion of available administrative remedies. Petitioner reserves the right to make "as applied" challenges in the future in the context of individual permit applications and decisions thereon. Whether contentions as to violation of constitutionally protected private property rights must be considered pursuant to WAC 173-26-186(5)?
2. Did Jefferson County ever hold a public hearing on a proposed SMP which included all the SMP's required objectives and components, including compliance with RCW 90.58.020, RCW 90.58.100 and WAC 173-26-201(2)(a)?
3. Does the content of the JCSMP adopted by Ecology substantively violate RCW 36.70A.370(1) and (2) and WAC 173-26-186(5) and WAC 173-26-020 (6) and (32), WAC 173-26-186?

Issues of Petitioners Olympic Stewardship Foundation

1. Did the new Jefferson County Shoreline Master Program ("SMP") promulgated by Ordinance No. 07-1216-3 fail to comply with RCW 90.58.020, .080(1), .100(1), .620 and WAC 173-26-191, -201, -211 because it is unsupported by new scientific studies or evidence of adverse effects constituting major or significant changed circumstances, allegedly resulting from current development regulations in Jefferson County?
2. Did Ordinance No. 07-1216-3 fail to comply with SMA policies RCW 90.58.020, .030, .065, .090, .100(6), .130, .250, .270, .340, .620, and/or .710; the State Guidelines (WAC Chapter 173-26), the Growth Management Act goals and

⁷ Petitioner, in addition to the issues set forth below, hereby incorporates by reference the issues/questions presented in the Petition for Review of Ecology and Jefferson County actions in approving the JCSMP submitted by the Olympic Stewardship Foundation by their attorney Dennis Reynolds as though fully set forth herein.

requirements, RCW 36.70A.480(3)(a) and (5) including internal consistency and consistency with the Comprehensive Plan because the SMP unduly emphasized aesthetics; did not balance reasonable uses; failed to address beneficial uses; failed to balance SMA values; failed to protect property rights; etc.?

3. Whether the County's Determination of Non-Significance conflicts with RCW 43.21C because it omits the terms "probable" and "significant"?
4. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply with the provisions set forth in RCW 90.58.020, .030(3)(e), .100 and/or WAC 173-26-176(2), WAC 173-26-221(5)(b), WAC 173-26-186(4) and (8)(C), WAC 173-26-191(2)(a)(iii)(A) because the showings required to obtain permits for common shoreline facilities as beach access structures, boating facilities, and armoring, as well as any development in flood-prone areas are beyond those required?
5. Did Jefferson County's adoption of Ordinance No. 07-1216-13 fail to comply with the requirements of RCW 90.58.020, .030(3)(e) and .050 because the SMP permitting requirements are too restrictive and/or impermissibly shift the burden of proof to an applicant?
6. Whether the shoreline buffers, vegetation conservation areas and setbacks required by the SMP (see Art. 6.1.D.4, 5, Art. 5(3)(A), p.5-2, Art. 6(3)(A)(11), p.6-16, Art. 6(4) (a)(1), p. 6-18, Art. 6(5)("Vegetation Conservation"), pp.6-18 to 6-22, Art. 7(1)(A)(6), p.7-1, SMP. Art. 8(8)(A)(2), p.8-36, *inter alia*) are excessively large when evaluated against the requirements of RCW 90.58.100(1), (1)(a), (d), (e), 2(a), and WAC 173-26-090, 201(2), 221(2), (5), 192(2)(a), 231(2), 241(2), (3), and 251(3) and otherwise are inconsistent with the balancing policies of RCW 90.58.020?
7. Whether Respondents' failure to treat existing shoreline homes as conforming in violation of RCW 90.58.620 is clearly erroneous?
8. Whether "no net loss" is a concept inapplicable to individual permitting decisions except for expansion and/or remodel of conforming structures as specified in RCW 90.58.620 and, if not, whether no net loss is satisfied by a property owner complying with mitigation sequencing set out in the SMA and the balancing policies found in RCW 90.58.020? Stated differently, do the referenced policies

control designation and regulation of critical areas located in SMA jurisdiction as mandated by RCW 90.58.160 and RCW 36.70A 480?

9. Whether the SMP's incorporation by reference of provisions of Jefferson County's Critical Areas Ordinance, and the resultant use of Growth Management Act standards found in the CAO in lieu of Shoreline Management Act policies regulating development and uses in or near designated critical areas within shoreline areas, is outside of the authority granted by the SMA?
10. Whether Ecology and the County violated mandated processes for approval of a new SMP including but not limited to (a) the quality and timing of its Final Cumulative Impact Assessment and Shoreline Inventory and (b) the requirement to foster meaningful comment and reasonably consider public comment?
11. Does the SMP impermissibly require restoration as a cost or condition of approving shoreline developments or uses (e.g. Art. 1(3)(G)(6), Art. 3(1)(B)(30(4)) in conflict with RCW 90.58. 020 and/or WAC 173-26-186(4) and (8)(C)?
12. Whether the SMP over-designates shorelines and lands as "Natural" and "Conservancy" in violation of WAC 173-26-211(3)(a), WAC 173-26-191(1)(e), WAC 173-26-211(5)(a)(1), WAC 173-26-211(5)(a)(iii), and WAC 173-26-211(5)(b)(1)

Issues of Petitioners Citizens Alliance for Property Rights Jefferson County Chapter

1. Did respondents fail to adequately "[u]tilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts" as required by RCW 90.58.020, 100(1) and (2)(a), and .620, and WAC 173-26-201(2), -211, -221(2), -231(2), -241(2), (3), and -251(3)? The SMA requires that respondents "[c]onduct or support such further research, studies, surveys, and interviews as are deemed necessary." *Id.* CAPR will argue that this was not done and thereby the SMP is flawed by respondents' failure to:
1. Buttress their regulatory prescriptions by physical and biologic science; and 2. Adequately take into account the social sciences, particularly economics.
2. Did Respondents fail to employ proper procedures in their adoption of the SMP in violation of RCW 36.70A.480(3)(a) and (5) and RCW 90.58.050 and .090(2) and WAC 173-26-090, -100, -110, -120 and Part III Guidelines?

- 1 3. Does the vagueness of the SMP result in an excessive delegation of discretion to
2 the regulators thereby violating RCW 90.58.020, .030(3)(c), .900 and WAC 173-
3 26-176 and WAC 173-26-191?
- 4 4. Do the particular showings required to obtain permits for such common shoreline
5 facilities as beach access structures, boating facilities, and armoring, as well as
6 any development in flood-prone areas, result in a *de facto* prohibition of these
7 facilities in violation of RCW 90.58.020, .100(6), WAC 173-26-201(2)(d) and
8 WAC 173-26-221(3)(c)(i)?

9
10 **CONSTITUTIONAL ISSUES OUTSIDE OF GMHB JURISDICTION**

- 11 8.26. Does the imposition of buffers and setbacks by SMP art. 6.1.D.4, 5, *inter alia*,
12 with all their attendant prohibitions and restrictions, constitute, by physical
13 invasion, the taking and damaging of private property without payment of just
14 compensation in violation of the Washington Constitution, art. I, § 16, and the
15 United States Constitution, amends. V and XIV?
- 16 8.27. Does the imposition of buffers and setbacks by SMP art. 6.1.D.4, 5, *inter alia*,
17 with all their attendant prohibitions and restrictions, constitute the regulatory
18 taking and damaging of private property without payment of just compensation
19 in violation of the Washington Constitution, art. I, § 16, and the United States
20 Constitution, amends. V and XIV?
- 21 8.28. Do the myriad prohibitions and restrictions on property development found
22 throughout the SMP, particularly in arts. 6 through 10, constitute the imposition
23 of unconstitutional conditions and impermissible exactions from property
24 owners, in return for the issuance of permits, in violation of *Nollan v. California*
25 *Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S.
26 374 (1994)?
- 27 8.29. Given what petitioners allege are the inadequate scientific justifications
28 underlying the restrictions on property development found throughout the SMP,
29 are these restrictions a violation of substantive due process pursuant to *Orion*
30 *Corp. v. State*, 109 Wn.2d 621 (1987), *cert. denied*, 486 U.S. 1022 (1988),
31 *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, *cert. denied*, 111 S. Ct. 284
32 (1990), *Guimont v. Clarke*, 121 Wn.2d 586 (1993), *Margola Assoc. v. Seattle*,
121 Wn.2d 625 (1993), and *Calder v. Bull*, 3 U.S. 386 (1798)?

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- 8.30. Given petitioners' allegations that the locally approved SMP was unlawfully adopted by the Board of County Commissioners (BOCC), in violation of WAC 173-26-100 and the BOCC's own standard practices, were petitioners' rights to procedural due process under the Washington Constitution, art. I, § 3, and the United States Constitution, amend. XIV, violated?
- 8.31. Did the adoption by reference of the Critical Areas regulations (SMP art. 1.6) violate petitioners' rights to procedural due process under the Washington Constitution, art. I, § 3, and the United States Constitution, amend. XIV?
- 8.32. Did the Department of Ecology improper interference in Jefferson County's local adoption of the SMP violate petitioners' rights to procedural due process under the Washington Constitution, art. I, § 3, and the United States Constitution, amend. XIV?
- 8.33. Were Jefferson County's responses to public comments, required by RCW 90.58.090(2) and WAC 173-26-120(6), so inadequate as to be unresponsive and thereby violate petitioners' rights to procedural due process under the Washington Constitution, art. I, § 3, and the United States Constitution, amend. XIV?
- 8.34. Are the SMP's required consideration of cumulative impacts in the permitting process (see, e.g., SMP arts. 1.2.C, 1.3.G.5, 2.C.27, 2.F.3, 2.S.47, 6.1.A.2.v, 6.1.C, 6.5.A.2, 7.2.F.1.iii, 7.2.H.1, 7.6.C.6, 8.2.A.2.iv, 8.2.A.4, 8.2.D.5.ii, 8.2.E.12.a.vi, 8.8.A.3, 9.5.D, and 9.6.C) a violation of petitioners' rights to equal protection of the law, as required by the Washington Constitution, art. I § 12, and the United States Constitution, amend. XIV, by treating similarly situated persons differently?
- 8.36. Is the SMP's creation of numerous nonconforming lots, structures, and uses (see, e.g., SMP arts. 2.A.21, 22; 2.I.12; and 2.N.7, 8, 9) a violation of petitioners' substantive due process rights by changing reasonable, settled expectations as found by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Rhod-A-Zalea & 35th Inc. v. Snohomish Cy.*, 136 Wn.2d 1(1998)?

1 8.37.By requiring petitioners show “by clear and convincing evidence that the
2 decision of the department is noncompliant with the policy of RCW 90.58.020 or
3 the applicable guidelines, or chapter 43.21C RCW as it relates to the adoption
4 of master programs and amendments under this chapter” (RCW
5 90.58.190(2)(c)), are petitioners denied their right to a neutral adjudicator at the
6 first level of review when a self-interested government agency deprives them of
7 their rights in property? *Concrete Pipe and Products of California, Inc. v.*
8 *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626
9 (1993).

10 **STATUTORY ISSUE OUTSIDE OF GMHB JURISDICTION**

11 8.35.Does the inadequate consideration of economic impacts by the SMP violate
12 RCW 43.21H.020 that requires “[a]ll state agencies and local government
13 entities with rule-making authority under state law or local ordinance must adopt
14 methods and procedures which will insure that economic impacts and values
15 will be given appropriate consideration in the rule-making process along with
16 environmental, social, health, and safety considerations”?
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